

FILED BY CLERK

AUG -7 2007

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ADRIAN AGUILAR,

Appellant.

)  
)  
) 2 CA-CR 2006-0365  
) DEPARTMENT B  
)

) MEMORANDUM DECISION

) Not for Publication  
) Rule 111, Rules of  
) the Supreme Court  
)  
)

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200502070

Honorable Joseph R. Georgini, Judge

AFFIRMED

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Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Kathryn A. Damstra

Tucson  
Attorneys for Appellee

Harriette P. Levitt

Tucson  
Attorney for Appellant

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E S P I N O S A, Judge.

¶1 Adrian Aguilar was convicted after a jury trial of aggravated assault of a police officer, a class six felony; resisting arrest, a class six felony; and domestic violence assault, a class one misdemeanor. The trial court suspended the imposition of sentence and placed

Aguilar on three years' supervised probation. On appeal, Aguilar argues there was insufficient evidence to sustain his assault and aggravated assault convictions; he also argues the arresting officer gave an impermissible legal opinion on an ultimate issue at trial, violating his constitutional due process rights. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶2 We view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against Aguilar. *See State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). In November 2005, Pinal County Sheriff's Deputy David Hailey met with Aguilar's sister, O., concerning a reported assault. She was upset and had visible injuries including red bumps on the side of her face and a cut on her nose. After speaking with her, Hailey went to Aguilar's residence.

¶3 Aguilar's mother admitted Hailey into the home and asked him to wait for Aguilar, who was in the bathroom. Hailey heard Aguilar yelling profanities in the bathroom, and when he emerged, Hailey observed that he appeared to be intoxicated. Aguilar agreed to accompany Hailey outside to talk; Aguilar's mother and another sister, Estrella, followed. During Hailey's questioning of him, Aguilar became angry and Hailey decided to arrest him for assaulting O.

¶4 When Hailey handcuffed Aguilar and began to perform a protective search, Estrella became agitated and started yelling. Hailey told her to be quiet and he would speak with her when he finished with her brother. Aguilar then began yelling profanities and attempted to jerk his body away from Hailey's control. As Hailey attempted to move Aguilar

towards his patrol vehicle, he stopped and twisted towards Hailey to face him several times. Hailey tried to place Aguilar in the car, but he forced one arm free. At this point, Hailey put him on the ground and requested backup.

¶5 While Hailey held Aguilar on the ground, Aguilar squirmed, kicked, attempted to spit at Hailey, grabbed at him, threatened him, and used profanities. At trial, Hailey testified that he had been “concerned” about being hit. Another deputy ultimately subdued Aguilar with a “Tazer gun.”

## **DISCUSSION**

### **A. Resisting Arrest and Aggravated Assault**

¶6 Aguilar first argues there was insufficient evidence to support his conviction for aggravated assault of Hailey, maintaining that his conduct—struggling with Hailey and kicking him—“is encompassed in the charge of resisting arrest, not in a charge of assault.” “When the evidence supporting a verdict is challenged on appeal, an appellate court will not reweigh the evidence. The court must view the evidence in the light most favorable to sustaining the conviction, and all reasonable inferences will be resolved against a defendant.” *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶7 We agree with the state that there was sufficient evidence to support the aggravated assault conviction. A person commits the offense of resisting arrest when he or she intentionally prevents or attempts to prevent a peace officer from affecting arrest by “using or threatening to use physical force against the peace officer.” A.R.S. § 13-2508(A)(1). Section 13-1203(A) defines the offense of assault as follows:

1. Intentionally, knowingly or recklessly causing any physical injury to another person; or
2. Intentionally placing another person in reasonable apprehension of imminent physical injury; or
3. Knowingly touching another person with the intent to injure, insult, or provoke such a person.

The offense becomes aggravated assault when the assailant knowingly or with reason to know assaults a police officer. A.R.S. § 13-1204(A)(5).<sup>1</sup>

¶8 The jury reasonably could find that Aguilar had resisted arrest after Hailey handcuffed him and placed him under arrest. Physical force in the context of resisting arrest need not be physical aggression such as punching or kicking. *See State v. Henry*, 191 Ariz. 283, 285, 955 P.2d 39, 41 (App. 1997) (defendant resisted arrest when he struggled with officer trying to handcuff him). Aguilar used force to resist Hailey by jerking his body, pulling his arm free, and struggling to turn to face Hailey. He resisted with enough physical force that Hailey found it necessary to place him on the ground to retain control of the situation. Hailey testified that he considered Aguilar's actions, as he attempted to place him in the car, to be resistance.

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<sup>1</sup>Although Aguilar suggests Arizona law would prohibit the state from charging and convicting him of both aggravated assault and resisting arrest, this argument is wholly undeveloped and supported by no authority whatsoever; we therefore do not address it. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶9 After Hailey placed Aguilar on the ground, Aguilar continued to flail and kick.<sup>2</sup> Hailey testified he was “concerned” Aguilar would hit him. Thus, there was independent evidence sufficient to sustain a conviction under § 13-1203(A)(2). A jury could find that, by kicking at Hailey, Aguilar intentionally placed him “in reasonable apprehension of imminent physical injury.” *See* A.R.S. § 13-1203(A)(2). Aguilar was aware that Hailey was a peace officer; accordingly, the conviction for aggravated assault under § 13-1204(A)(5) was proper.

## **B. Assault**

¶10 Aguilar next argues there was insufficient evidence to support his conviction for assaulting his sister, O. Again, we will not overturn the jury’s verdict unless there is a lack of substantial evidence to support it. *See Lee*, 189 Ariz. at 603, 944 P.2d at 1217.

¶11 As we previously stated, assault consists of “intentionally, knowingly or recklessly causing any physical injury to another person.” § 13-1203(A)(1). Although the state did not call O. as a witness at trial, Hailey testified about the injuries he had observed on her face, and both Aguilar’s sister, Estrella, and his mother testified that Aguilar had slapped O. From this evidence, the jury could find the state had established the elements of the offense.<sup>3</sup>

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<sup>2</sup>Because we can affirm Aguilar’s conviction without considering his spitting at Hailey, we need not consider the possible distance that human saliva can be propelled or the “reasonable apprehension of imminent physical injury” that might accompany being the target of a failed spitting attempt. A.R.S. § 13-1203(A)(2).

<sup>3</sup>Aguilar further contends that his assault conviction is improper because O. hit him first and his slap was, therefore, in the course of “mutual combat.” However, mutual combat is not a defense to a criminal prosecution for assault. *State v. Mace*, 86 Ariz. 85, 88, 340

### C. Deputy Hailey's Testimony

¶12 Finally, Aguilar argues that Hailey violated his due process rights by testifying to an ultimate legal conclusion at trial. Aguilar's mother and sister testified that he did not resist Hailey. On rebuttal, the prosecutor asked Hailey, "What do you consider resisting?" Hailey responded,

Well, resisting in my opinion would be after I had handcuffed Mr. Aguilar and trying to get him to go inside my vehicle to sit down. He wouldn't go. He kept trying to jerk his arms away from me to turn around to face me, I believe to confront me about his sister.

¶13 Aguilar failed to object to this testimony at trial. Failure to object at trial waives all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error goes to the foundation of a case and exists when the defendant could not have received a fair trial. *Id.* The burden of persuasion in fundamental error review is on the defendant. *Id.* He must prove that error existed and that it caused him prejudice. *Id.* ¶ 20.

¶14 Aguilar fails to establish any error here, much less error that can be characterized as fundamental. He is correct that a witness may not testify as to whether the defendant is guilty or innocent. *See Fuenning v. Superior Court*, 139 Ariz. 590, 605, 680 P.2d 121, 136 (1983). However, *Fuenning* does not preclude all testimony on the ultimate issue of a case. *See State v. Doerr*, 193 Ariz. 56, ¶ 26, 969 P.2d 1168, 1175 (1998). A lay witness may offer opinion testimony to the ultimate issue of a case "when it is 'rationally

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P.2d 994, 996 (1959). Nor did Aguilar advance a theory of self-defense or request a jury instruction to that effect.

based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.'" *Id.*, quoting Ariz. R. Evid. 701, 17A A.R.S. Hailey offered his opinion regarding what Aguilar did to resist his arrest, focusing on Aguilar's conduct: he refused to cooperate, jerked his body, and attempted to turn to face and confront Hailey. Hailey's perception that by engaging in this conduct Aguilar was resisting the arrest could help the jury determine whether Aguilar had, indeed, committed the offense of resisting arrest. *See Doerr*, 193 Ariz. 56, ¶¶ 25-26, 969 P.2d at 1175 (officer did not testify as an expert on truthfulness, rather his testimony stated reasons he did not believe the defendant's story). Admitting Hailey's testimony was not error.

#### **DISPOSITION**

¶15 For the foregoing reasons, Aguilar's conviction and sentence are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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JOSEPH W. HOWARD, Judge